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# Supreme Court of the United States

OCTOBER TERM, 1968.

## No. 593

MRS. RUBY L. PORTER, ADMINISTRATRIX OF THE ESTATE OF JAMES A. PORTER, DECEASED,
Petitioner,

versus

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

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## INDEX.


| | Page |
|---|---|
| CITATIONS TO OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED FOR REVIEW | 2 |
| STATUTES INVOLVED | 3 |
| STATEMENT OF THE CASE | 5 |
| ARGUMENT | 11 |
| PRAYER | 16 |
| APPENDIX A | 19 |


## TABLE OF AUTHORITIES.


| | |
|---|---|
| Armstrong vs. Chicago & W.I. RR., 183 NE 478 | 15 |
| Brady v. Terminal Ry. Assn. of St. Louis, 303 U.S. 10, 58 S.Ct. 426 (1938) | 15 |
| Brailey v. B. & O. RR. Co. & N. Y. Central RR. System, 151 F.Supp. 431 (1957) | 15 |
| Byrne v. Penn. RR. Co., 262 F.2d 906 | 15 |
| Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740 (1946) | 15 |
| Linstead v. Ches. & Ohio RR. Co., 276 U.S. 28, 48 S.Ct. 241, 72 L.Ed. 453 (1928) | 15 |
| Lovett v. Calloway, 69 F.Supp. 532 (1946) | 15 |
| Missouri, K. & T. R. Co. v. Grimes, 196 SW 961 (1917) | 16 |
| New Orleans & Northeastern Railroad Co. vs. Lewis, 58 So.2d 486 | 15 |
| O'Conner v. Chicago, M. St. P. & R. Co., 251 NW 647 (1933) | 16 |

TABLE OF AUTHORITIES—(Continued):


| | Page |
|---|---|
| Oliver v. Northern Pac. RR. Co., 196 Fed. 432 | 16 |
| Porter v. St. Louis-San Francisco Ry. Co., 354 F.2d 840 (1966) | 16 |
| Rogers v. Missouri Pacific Railroad Co., 77 S.Ct. 443, 352 U.S. 500 | 12 |
| Shenker v. B. & O. RR. Co., 83 S.Ct. 1667, 347 U.S. 1 | 16 |
| Sinkler v. Missouri Pacific Railroad Co., 78 S.Ct. 758, 356 U.S. 318 | 13 |
| Weissinger v. Mansur & Tibbetts Implement Co., 75 Miss. 64, 21 So. 757 | 15 |
| Wilson v. Terminal Ry. Assn. of St. Louis, 77 SE2d 429 | 16 |

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ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Respondent.

---

# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Mississippi entered in the above entitled case on June 10, 1968, wherein judgment became final on June 25, 1968.

## CITATIONS TO OPINIONS BELOW.

The opinion of the Supreme Court is reported in 211 So.2d, page 530. A certified copy thereof will be found set forth in extenso in the Appendix, as Appendix A.

## JURISDICTION.

There are special and important reasons for the review of the questions presented. They are questions of substance and to a degree they are federal questions of substance not heretofore determined by this Court, and they are federal questions decided by a subordinate court in a way probably not in accord with the applicable decisions of this Court.

The judgment of the State Supreme Court was rendered on June 10, 1968, and became final on June 25, 1968, a copy of Judgment is appended in extenso to this Petition as Appendix A.

The jurisdiction of this Court is invoked under Title 28 of the United States Code, Chapter 81, Section 1257 (3).

## QUESTIONS PRESENTED FOR REVIEW.

The questions here really presented for review are, in fact, the validity of the Federal Employers' Liability Act. The question of whether or not the validity of this Act can be sustained if state courts are permitted by niggardly construction to thwart the uniform application of this federal statute adopted for the protection of vast thousands of railroad workers in an extremely hazardous interstate occupation, and the question of whether or not the Act can continue to afford protection to employees in a common interstate endeavor.

The questions are national in scope and involve the entire railroad transportation industry and hundreds

of thousands of workers that come within the purview of the federal legislation enacted for their protection.

In a more restricted and limited scope, however, is the serious question presented here with reference to the action of the Mississippi Supreme Court in ruling as a matter of law that the deceased, Porter, was not an employee of the Frisco and therefore not entitled to the protection of the Federal Employers' Liability Act.

The questions presented are, of course, vital to the dependent next to kin of Porter, but even more far reaching, they are vital and go to the heart of the question of whether or not the Federal Employers' Liability Act, which was passed for the protection of railroad workers in this country, is valid and enforceable and affords the protection intended by Congress when niggardly and narrow and restricted interpretation of the Act by lower courts are permitted to stand.

## STATUTES INVOLVED.

The federal statute involved here is the Federal Employers' Liability Act, 45, United States Code Annotated Section 51, page 150, reading as follows: to-wit;

> §51. Liability of Common Carriers by Railroad, in Interstate or Foreign Commerce, for Injuries to Employees from Negligence; Definition of Employees.

"Every common carrier by railroad while engaging in commerce between any of the several

States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the

benefits of this chapter. Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404."

## STATEMENT OF THE CASE.

This cause of action was remanded from the United States District Court for the Northern District of Mississippi by order of the United States Court of Appeals to the Circuit Court of Marshall County, Mississippi, where it was tried before a jury and a verdict was returned in favor of the Plaintiff in the amount of One Hundred Thirty Thousand ($130,000.00) Dollars, on which judgment was ordered on the 17th day of November, 1966, from which Defendant appealed to the Supreme Court of Mississippi which reversed the judgment below and rendered judgment for the Defendant.

For the purpose of brevity in this brief the deceased shall be referred to as Porter, the Union Railway Company as Union and the St. Louis-San Francisco Railway Company as Frisco.

This is a suit brought by the Administratrix of the Estate of Porter against the Frisco under the Federal Employers' Liability Act for the wrongful death of Porter by reason of negligence on the part of the Frisco which, either in whole or in part, brought about the death of Porter on the night of September 8th or rather the very early hour of approximately

12:30 A.M. on the morning of September 9, 1961 (R. 39, 44). Porter was a member of Union switch crew which at the time of the accident was making a delivery, known as the Frisco delivery, into the Frisco's K. C. Junction Yard in the City of Memphis, Tennessee and was at the time performing work and service for the use and benefit of the Frisco in making the delivery of such cars and for which services by said switching crew the Frisco paid the Union switching charges in the amount of $88.83 (R. 75).

The Union crew, including Porter, while operating over the tracks of the Frisco in K. C. Junction Yard and in Frisco's McLemore No. 1 track to which this particular delivery was being made, was under the direction, control and supervision of the Frisco Railroad and operating under its Book of Rules. Under these circumstances the Union switching crew, including Porter, were bound to take instructions and directions from any officers, agents or employees of the Frisco while so operating over Frisco's track (R. 148, 160, 161, 170, 171, 188, 207, 208, 212, 213, 214, 215).

On the occasion in question Porter and his crew were shoving a cut of some 39 cars in an easterly or southeasterly direction along McLemore No. 1 track in the darkness of the night time. Porter was riding on the third car from the lead end or southeasterly end of the cut of cars. The engine or locomotive was on the west end shoving the cut in a southeasterly direction. Upon entering the K. C. Junction Yard owned by the Frisco, a Frisco agent and yard clerk,

one Mr. York, advised Porter and his crew that Frisco's McLemore No. 1 track into which the delivery was being made was clear except for one car at the far end. In truth and in fact, however, the said car was not at the far end of McLemore No. 1 track, but was approximately 20 or 25 car lengths (R. 370) or nearly one quarter of a mile from the far end or east end of McLemore No. 1 track positioned in the darkness behind a building and around a curve from the direction from which the shove was being made. Porter's train or cut of cars upon which he was riding collided with said car with great force and violence and Porter was knocked from the top of said third car and run over by his train, severing his body at the waist. Eleven cars were shoved over Porter's body before the train was brought to a stop.

There were no eyewitnesses to the accident, but the last person to see Mr. Porter alive was his foreman, Mr. Scoggins, who saw him performing his duties riding about one-third of the way back on the third car from the lead end of the cut just moments before his death (R. 362).

There was positive evidence that the first car to pass over Porter's body was the fourth car from the east end of the cut as indicated by the first evidence of blood on the leading wheels on the east end and north side of the fourth car in the cut of cars. It is beyond dispute that Porter's cut collided with and coupled into the car which was sitting in McLemore No. 1 track (R. 102, 103). This was a Frisco hopper

car which was placed in Frisco's McLemore No. 1 track by the Frisco crew earlier that night. The only dispute that arises with reference to this car is to its precise location on McLemore No. 1 track at the moment of the collision between it and Porter's cut. Witnesses Harris and Boggs testified very graphically as to where the collision between the cars occurred in their testimony that grayish white dust or material was on the track at the point where the collision occurred and the identical grayish white substance or material was all over the Frisco covered hopper which was sitting in the track loaded with feed and with both the hand brakes and the airbrakes applied on it at the time of the collision (R. 147). These witnesses also testified that they measured the distance from the grayish white substance on the track and it was three car lengths east of Porter's body (R. 152, 153). There was a dispute by the Defendant's witnesses, Foley and Chalk, that the Frisco hopper car was left at the point where the grayish white substance was found on the track. Their testimony was that the car was some 200 feet east of this point, but this testimony was inconsistent with their sworn testimony on deposition that the Frisco car was left on No. 1 track approximately 10 or 12 car lengths east of Bellevue Overpass, which would have placed it almost precisely where witnesses Boggs and Harris testified that they discovered the grayish white substance on the track.

Porter, at the time he met his untimely and wrongful death, although a member of the Union switch-

ing crew, was performing work and service for the use and benefit of the Frisco operating over the Frisco's track making the Frisco delivery under the Frisco's Uniform Code of Operating Rules under the Frisco's direction, supervision and control and taking directions from an agent of the Frisco which agent negligently and carelessly gave Porter and his crew misinformation as to the location of the Frisco hopper car on Frisco's No. 1 track and Porter's death was brought about, either in whole or in part, as a result of such negligence on the part of the Frisco. Porter was clearly an employee of the Frisco for the purposes of the Federal Employers' Liability Act and his widow as Administratrix of his estate had a right to invoke its privileges and benefits by propounding her claim against the Frisco in the Circuit Court of Marshall County, Mississippi.

The federal question sought to be reviewed was first raised at the close of Plaintiff's testimony in the Circuit Court of Marshall County, Mississippi, at which time Defendant moved for a pre-emptory instruction to find for the Defendant (R. 217, 218, 219). In overruling the motion the Court said (R. 218):

The Court:

"Overruled. Do you want to be heard?"

Mr. Bolton:

"Yes sir, but you have already overruled it."

The Court:

"Well, I'm going to be frank with you, Mr. Bolton. I think it is a jury question and I am going to let it go to the jury."

Mr. Bolton:

"Now comes the Defendant and moves the Court to find as a matter of law that the Plaintiff was not an employee of the Defendant."

The Court:

"Overruled." (R. 219.)

At the conclusion of all the testimony (R. 406) the Respondent moved the Court to direct a verdict in its favor on the grounds that the Plaintiff failed to show that the deceased was an employee of the Defendant and that no evidence of negligence was shown. The Court reserved its ruling and asked whether or not the Plaintiff had a motion (R. 407), wherein the Plaintiff moved for a directed verdict and that the Court direct the jury that at the time of his death, that Porter was an employee of the Frisco and that he had a right to maintain an action to recover against the Frisco under the Federal Employers' Liability Act. In so doing, both sides waived a jury determination on this issue.

After hearing argument on the motion, both for the Plaintiff and for the Defendant, the Court ruled (R. 407, 408) that as a matter of law and fact Porter was an employee of the Frisco and submitted the case to the jury on the question of negligence and quantum.

The question was again brought up in Motion for New Trial (R. 470, 471) as enumerated in paragraph 8, 9, 10 and 11 of the motion to the effect that the Court erred in finding as a fact and as a matter of law that James A. Porter was an employee of the St. Louis-San Francisco Railway Company and therefore his Administratrix was entitled to bring this action under the Federal Employers' Liability Act.

Motion for New Trial overruled (R. 473).

The federal question was again presented on appeal to the Supreme Court of Mississippi where lengthy briefs were filed and arguments presented on both sides, pro and con, with reference to whether or not Porter was an employee of the Frisco under the terms and provisions of the Federal Employers' Liability Act. The Mississippi Supreme Court, utterly and totally at odds with a long line of federal decisions on this question, entered a judgment in accordance with the contentions of the Respondents, reversing the finding of fact and ruling as a matter of law that Porter was not an employee of the Frisco, reversing the judgment of the Circuit Court of Marshall County and rendering a judgment in favor of the Respondent.

## ARGUMENT.

The cases sustaining jurisdiction of this Court on review of federal questions as involved here in the interpretation, application and validity of a federal

statute drawn into question; viz, the Federal Employers' Liability Act are numerous, but perhaps the clearest language was set out in the case of *Rogers vs. Missouri Pacific Railroad Company,* 77 S.Ct. 443, 352 U.S. 500, wherein it is stated that this Court will grant certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction. The kind of misconception evidenced by the opinion of the Mississippi Supreme Court fails to take into account the special features of this statutory negligence action which make it significantly different from the ordinary common-law negligence action. The Mississippi Court has not given proper scope to this integral part of the congressional scheme.

The Mississippi Court chose to ignore these judicial mandates. Here we see special and important reasons for review by certiorari of the judgment of the Mississippi Court which has decided a federal question of substance in a way probably not in accord with and in direct conflict with the applicable decisions of this Court.

Railroading is a unitary enterprise operating in interstate commerce, its economic resources obligated to bear the burden of all injuries befalling those engaged in this hazardous occupation arising out of the fault of any other member engaged in the common endeavor. Justice demands that one who gives his labor to the furtherance of such enterprise should be assured that all combining their exertions

with him in the common pursuit will conduct themselves in all respects with sufficient care that his safety while doing his part will not be in danger.

This is essentially the language of this Court in the case of *Sinkler vs. Missouri Pacific Railroad Company*, 78 S.Ct. 758, 356 U.S. 318. The language "any other member engaged in the common endeavor" and "all combining their exertions with him in the common pursuit" is certainly language that should embrace the carrier as well as the carrier's employees.

Much apparent confusion still exists in this country despite the many rulings of this Court as to whether or not railroad employees engaged in interstate commerce are afforded the protection of the Federal Employers' Liability Act when they are injured by another railroad on the tracks or property of the other railroad. If this protection of these interstate employees is not afforded by the Federal Act, thousands of them daily are exposed to the hazards inherent in their occupation while on the tracks or property of other railroads and are wholly without the protection which congress sought to afford by the passage of the Federal Employers' Liability Act. If such is the case, there is no uniformity of law affording them protection of their rights when injured by a carrier other than the one by whom they are directly employed. They are subject to a hodgepodge of local judicial remedies, and they are subject to the many grave injustices that congress

sought to prevent by the enactment of a uniform federal statute by the passage of the Federal Employers' Liability Act.

It is a general practice of all railroads of the United States that the receiving carrier deliver to the connecting carrier interchange cuts or groups of cars to be forwarded and delivered by the railroad receiving the cars on the interchange tracks and the employees making these deliveries are under the directions, rules and supervision and control of the receiving road. This duty is regularly performed by all railroad employees of the United States in the unity of service in moving interstate across the nation.

It is a settled rule of law in both federal and state courts that both the defendant and the plaintiff have the right to waive a jury on any issue and the trial court in this instance acts as a jury and a finder of facts, and when by motion of either side requests a finding of the facts by the court waiving the jury and this motion is joined in by the other party to the litigation, then the finding of facts by the court is in the same category as finding of facts by jury. In Mississippi this is statutory.

Mississippi Code, 1942 Annotated, Section 1521. Trial of Facts by the Court.

"Trial by jury may be waived by the parties to an issue of fact in actions on contract, and with the assent of the court, in other actions."

Serious error was committed by the State Supreme Court in reversing the lower court's finding as a matter of law and fact that Porter was an employee of Frisco.

This question was settled long ago in Mississippi in the case of *Weissinger vs. Mansur & Tibbetts Implement Company*, 75 Mississippi 64, 21 So. 757, wherein it was held that where a jury is waived, the Supreme Court will attach the same weight to the finding of the judge as to the verdict of a jury. Also see *New Orleans & Northeastern Railroad Company vs. Lewis*, 58 So.2d 486, holding that the Supreme Court cannot substitute its judgment for that of jury on issue of fact.

Cases supporting Petitioner's position with reference to joint employee relationship authorizing action against non-employing carrier under the Federal Employers' Liability Act, are listed below:

*Armstrong v. Chicago & W.I. RR., 183 NE 478;*
*Brady v. Terminal Ry. Assn. of St. Louis, 303 U.S. 10, 58 S. Ct. 426 (1938);*
*Brailey v. B. & O. RR. Co. and N. Y. Central RR. System, 151 F.Supp. 431 (1957);*
*Byrne v. Penn. RR. Co., 262 F.2d 906;*
*Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740 (1946);*
*Linstead v. Ches. & Ohio RR. Co., 276 U.S. 28, 48 S.Ct. 241, 72 L.Ed. 453 (1928);*
*Lovett v. Calloway, 69 F.Supp. 532 (1946);*

*Missouri, K. & T. R. Co. v. Grimes, 196 SW 961 (1917);*

*O'Conner v. Chicago, M. St. P. & R. Co., 251 NW 647 (1933);*

*Oliver v. Northern Pac. RR. Co., 196 Fed. 432;*

*Porter v. St. Louis-San Francisco Ry. Co., 354 F.2d 840 (1966);*

*Shenker v. B. & O. RR. Co., 83 S.Ct. 1667, 347 U.S. 1;*

*Wilson v. Terminal Ry. Assn. of St. Louis, 77 SE2d 429.*

A federal question of substance is involved here and the validity of a federal statute is clearly in question.

**PRAYER.**

Wherefore, your Petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of Mississippi, commanding said Court to certify and send to this Court a transcript of the record in the case entitled "St. Louis-San Francisco Railway Company, Appellant vs. Mrs. Ruby L. Porter, Administratrix of the Estate of James A. Porter, Deceased, Appellee, No. 6117," including also the proceedings in said Supreme Court to the end that said cause may be reviewed and determined by this Court and the judg-

ment of the Circuit Court of Marshall County, Mississippi, be reinstated here.

Respectfully submitted,

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**IN THE SUPREME COURT OF MISSISSIPPI.**

**No. 44,932.**

**ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,**

**versus**

**MRS. RUBY PORTER, ADMINISTRATRIX OF THE ESTATE OF JAMES A. PORTER, DECEASED.**

ETHRIDGE, CHIEF JUSTICE:

This is an appeal from a jury verdict and judgment of the Circuit Court of Marshall County, awarding damages to appellee, Mrs. Ruby L. Porter, administratrix of the estate of James A. Porter, deceased, who allegedly was killed while an employee of the St. Louis-San Francisco Railway Company (hereinafter called Frisco), appellant. The suit is not a common-law action in tort but is based solely upon the Federal Employers' Liability Act. 45 U.S.C.A. §§ 51-60 (1954). A suit for damages under that statute may be brought by "any person suffering injury while he is employed" by a railroad, or "in case of the death of such employee," by his personal representative for the benefit of his survivors. 45 U.S.C.A. § 51 (1954). Hence in order for recovery to be justified in this case, appellee's decedent must have been an employee of Frisco at the time he was killed. After careful examination of the facts and pertinent law, which is determined by the federal decisions, we conclude that Porter was not an employee of Frisco, un-

der either the loaned servant or dual employment doctrines. Accordingly, the judgment of the circuit court is reversed, and judgment is rendered here for appellant.

## I.

Porter was a switchman employed by the Union Railway Company (hereinafter called Union), in the City of Memphis, Tennessee, at the time he met his death on September 9, 1961. Union is a switching or belt line around the City of Memphis, serving various industries and Missouri-Pacific trains. In 1962 appellee filed this suit in the Circuit Court of Marshall County, Mississippi. Frisco removed it to the Federal District Court for the Northern District of Mississippi. That court overruled plaintiff's motion to remand, on the ground that Porter was not an employee within the meaning of the FELA. After amending her complaint, plaintiff conceded that she alleged no cause of action except under the FELA, so the district court gave a summary judgment for defendant. On appeal, the United States Court of Appeals, Fifth Circuit, held that the general allegation that Porter was an employee of Union did not "preclude plaintiff from showing, if she can, that under the circumstances that existed at the time of the injury Porter was an employee of Frisco within the meaning of that term as it is used" in the FELA; and that under some circumstances one may be the servant of two masters, or a loaned servant. *Porter v. St. Louis-San Francisco Ry.*, 354 F.2d 840 (5th Cir. 1966).

Thus the Court of Appeals directed remand of the case to the state court, which was done, and the present trial ensued.

We will assume that under federal decisions there was enough evidence to make jury issues of whether Frisco was negligent, and whether such negligence contributed to Porter's death. We do not, however, reach these or any other issues raised in appellant's brief, except that relating to the employment relationship. Nevertheless, a brief outline of the facts as presented by the opposing parties is essential for an understanding of the employment issue.

At the time of his death, Porter was a switchman in the general employ of Union. He had worked for Union for fifteen years and had received his pay exclusively from it. On the night of the accident, a Union switching crew, of which Porter was a member, was directed by the Union yardmaster to transfer a string of thirty-nine cars assembled in the Union yard to the Frisco yard. The crew was composed entirely of Union's employees. The time of making delivery of the cars to Frisco was fixed by Union without notice to Frisco, and the delivery was made under the orders of Union's yardmaster. Scoggins, the crew foreman, had received instructions from his yardmaster to make the Frisco delivery out of cars on two designated Union tracks.

A Union engine was coupled on the west end of the cut of thirty-nine cars and pulled along Union's track

until the last car of the cut was west of the switch into Frisco's McLemore No. 1 switch track. Scoggins walked toward a little shanty and asked the Frisco yardman whether McLemore No. 1 was clear. He replied that it was, "except for one car on the far end." The Frisco yardman gave him no instructions, only that information. After the switch was thrown the Union engine began pushing the string of cars on the Frisco track. Apparently Scoggins was on the ground at that time, and Porter passed him riding on top of the third car from the front end of the string being pushed onto McLemore No. 1. Scoggins told him what the Frisco yardman had said, and Porter replied, "O.K."

On the afternoon before the accident, a Frisco crew had shoved a loaded, covered hopper car containing animal feed onto the McLemore No. 1 track. Defendant's witnesses testified that they left it with hand brakes locked at the "dead end of McLemore 1 track." Plaintiff's theory was that the hopper car was not placed at the end of that track, but was left some distance further up it.

After the Union engine had been returned to the Union yard, Porter was discovered missing. Upon a search of the Frisco yard, his body was found severed on the track, with his lighted lantern in his hand. The covered hopper car, placed on the track the previous afternoon by the Frisco crew, was found coupled to the cut of thirty-nine cars, but without air connection. The two cars at the end of

the cut were gondola cars, upon which Porter could not walk. It was plaintiff's theory that the hopper car had not been placed at the end of McLemore No. 1 track, but several hundred feet from the end; that it was dark that night and a neon sign on an adjacent building rendered visibility difficult; that Porter relied upon misinformation given Scoggins by Frisco's yardman; and that when the cut of thirty-nine cars collided with the parked hopper car, Porter, riding on the third car from the head of the cut, was thrown off and killed. Witnesses for plaintiff stated that three car lengths from Porter's body they found a grayish-white substance on the ground next to the track, which was similar to the feed on the exterior of as well as in the hopper car. They found blood on a front wheel of the fourth car from the hopper car. Some of the evidence indicated that colliding with a loaded hopper car with hand brakes set would cause a substantial impact to the first ten cars of the string.

On the other hand, the defendant's version of the facts was that there were no eyewitnesses to the accident, and no one had personal knowledge as to why or how Porter was killed. The plaintiff's evidence, defendant contends, is highly conjectural and speculative. Measurements made on the night of the accident, offered by defendant, indicated that the lead car of the cut could not have come in contact with the hopper car, which direct testimony showed was several hundred feet down the track, until after Porter had already been run over and killed.

At the close of the evidence, the circuit court peremptorily instructed the jury that Porter was an employee of Frisco at the time of his death within the terms of the FELA, and submitted the case to the jury on the questions of negligence and proximate cause. We have concluded that the granting of the plaintiff's peremptory instruction was error and that the defendant itself was entitled to its requested peremptory instruction, Plaintiff-appellee failed to offer sufficient evidence to make a jury issue as to whether Porter was an employee of Frisco within the purposes and intent of the FELA and the federal decisions interpreting that statute.

## II.

Porter had been employed by Union for many years. It directed his work and paid his wages. At the time of the accident he was engaged in performing work for Union as a member of its switching crew. He rode a car, shoved by a Union engine, from the Union into the Frisco yard solely for the purpose of delivering the cars to Frisco. They had never been in Frisco's possession. In doing this work, Porter, employed and paid by Union; was performing work for it under orders from the Union yardmaster and foreman. He was paid nothing by Frisco and received no orders from it. He was not authorized to and did no switching for Frisco.

Appellee relies upon two propositions: the loaned servant and dual employment doctrines, which here

are in some respects co-extensive. It is argued that under the FELA cases, Porter was a loaned servant of Frisco. This contention is based upon several factors. Porter was killed while he was working on a switching operation by Union on the Frisco tracks. He and his fellow crew men were governed by Frisco's Uniform Code of Operating Rules while on the Frisco track. The record indicates no specific application of Frisco rules to the Union crew on this occasion, except the statement by the Frisco yardman to Scoggins that McLemore No. 1 was clear except for a car at the far end. There is no evidence that Frisco directed or controlled the movement of the Union crew while on Frisco's track on this particular switching operation.

There is general testimony by several witnesses for plaintiff that, when Union shoved the cut of cars on McLemore No. 1, the Union crew was under the direction and control of Frisco. However, these statements are general conclusions of the witnesses. They are refuted by the undisputed fact that the only thing Frisco did was to designate the switch track for the string of cars when it was delivered. Direction and control of the Union crew was by Union and its yardmaster and foreman. Union was acting somewhat like an independent contractor. It is a Memphis belt line engaging in switching activities for private industries and railroads. This is illustrated by the fact that subsequently Frisco paid Union $88.83 for the delivery by Union of the cut of cars onto the Frisco track. The statement by the Frisco yard-

man to Scoggins as the string of cars moved on McLemore No. 1 was not direction and control, but information for the convenience and safety of both Union and Frisco. Movement of the string of cars by Union to the Frisco track was for the benefit of Union, which received a fee for this service, as well as for the benefit of Frisco.

These conclusions, we think, are in accord with the FELA, which requires Porter to have been an employee of Frisco at the time of his death, and with the decisions of the United States Supreme Court and other federal courts, which are controlling on this issue.

*Standard Oil Company v. Anderson,* 212 U.S. 215, 29 S.Ct. 252, 53 L.Ed. 480 (1909), does not involve the FELA but is a leading case on the loaned servant doctrine. The Court there said:

> One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation.
>
> . . . .
>
> It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his employ who can do it nor is

willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men become *pro hac vice* the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work and they are for the time his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still in its doing his own work. To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking. *Id.* at 220-22, 29 S.Ct. at 253-54, 53 L.Ed. at 483-84.

These rules were applied in *Hull v. Philadelphia & Reading Railway Company,* 252 U.S. 475, 40 S.Ct. 358, 64 L.Ed. 670 (1920). Hull was in the general employ of Western Maryland Railway Company in Pennsylvania, which connected with the Philadelphia and Reading Railway and ran into another city. Through freight rains were operated from the WM to the P&R. Hull was a brakeman on a WM train which was to run over the tracks of the P&R. Before starting, the WM crew received instructions from the P&R yardmaster as to operation of the train, including directions to pick up seven cars at a certain town. While the WM crew was getting these cars on the P&R track, Hull was killed. The railroads had a contract for cooperating and supplementing their services on both roads. Affirming a directed verdict for the P&R, the Court said:

> [I]n the Employers' Liability Act Congress used the words "employee" and "employed" in their natural sense, and intended to describe the conventional relation of employer and employee. The simple question is whether, under the facts as recited and according to the general principles applicable to the relation, Hull had been transferred from the employ of the Western Maryland Railway Company to that of defendant for the purposes of the train movement in which he was engaged when killed. He was not a party to the agreement between the railway companies, and is not shown to have had knowledge of it; but, passing this, and assuming the provisions of the

> agreement can be availed of by petitioner, it still is plain, we think, from the whole case, that deceased remained for all purposes—certainly for the purposes of the act—an employee of the Western Maryland Company only. It is clear that each company retained control of its own train crews; that what the latter did upon the line of the other road was done as a part of their duty to the general employer; and that, so far as they were subject while upon the tracks of the other company to its rules, regulations, discipline, and orders, this was for the purpose of coordinating their movements to the other operations of the owning company, securing the safety of all concerned, and furthering the general object of the agreement between the companies. (*Id.* at 479-80, 40 S.Ct. at 359-60, 64 L.Ed. at 673).

In the instant case, as in *Hull*, it is clear that Union retained control of its own train crew and that what the Union crew did upon the switch track of Frisco was done as a part of its duty to the general employer. And so far as they were subject to the rules and regulations of Frisco while on its switch track for a short time, this was for the purposes of coordination, safety, and facilitating delivery of the cars to Frisco.

*Linstead v. Chesapeake & Ohio Railway Company*, 276 U.S. 28, 48 S.Ct. 241, 72 L. Ed. 453 (1928), distinguished *Hull* and affirmed a jury finding that the injured plaintiff was a loaned employee of the Chesapeake & Ohio Railway Company. Linstead's general

employer was the Big Four Railroad. There was a thirteen-mile stretch of C&O track below Cincinnati into Kentucky, as to which the two railroads made an arrangement for Big Four to lend to the C&O a locomotive, caboose and train crew to transfer freight trains to the Big Four over the rails of the C&O. The latter paid no rental for this locomotive and crew but rendered reciprocal service. When traveling over this thirteen-mile stretch, the Big Four train crew was furnished with time tables and rule books of the C&O and was under the actual supervision and control of its trainmaster. The Big Four locomotive was pulling a train of cars over this stretch of the C&O when it was run into by a C&O train, causing Linstead's death.

The distinction from *Hull*, the Court said, was that Linstead and his crew were doing the work of the C&O, transporting the cars over the thirteen-mile stretch, under the rules of the C&O and the immediate supervision and direction of its trainmaster in charge of trains on this stretch of C&O track. For this period there was a transfer of the relation of Linstead from the general employment of Big Four to a special employment by C&O. In contrast, Hull was doing the work of the WM and for its benefit. The mere transfer of the WM train to the rails of the other road did not transfer the relation of Hull from his general employment to a special employment. In effect, Linstead, by again applying the common law criteria for a loaned servant, reaffirmed the result reached in *Hull*.

It is noteworthy that Linstead's crew carried cars for which the C&O was responsible and which had come into its possession. In the instant case, Porter was transporting cars for which Union was responsible, and which had not come into Frisco's possession at the time he was killed. He was engaged in Union's business, and was employed by it.

The most recent Supreme Court decision, on point, *Shenker v. Baltimore & Ohio Railroad Company*, 374 U.S. 1, 83 S.Ct. 1667, 10 L.Ed.2d 709 (1963), supports the conclusion that Porter was not a loaned servant of Frisco. In *Shenker*, plaintiff was employed by the B&O at a station in Pennsylvania where there were two tracks owned and operated by the B&O, and two by the Pittsburgh and Lake Erie Railroad. The B&O maintained a station and station facilities, and, although the P&LE maintained a station, it had no employees, all necessary services for the two stations being provided by B&O employees. On the date of the accident, Shenker handled the mail for the P&LE train. He loaded twenty-five bags on a B&O wagon at the B&O station and pushed it across the tracks to the P&LE platform. While loading through a mail car door with the assistance of a P&LE baggageman, Shenker received a ruptured disc. He sued both railroads. The district court directed a verdict in favor of the P&LE, and the jury returned a verdict for plaintiff against the B&O. The Supreme Court, applying the common law loaned servant doctrine as defined in *Standard Oil Company v. Anderson*, affirmed. The Court stated that the immediate control

and supervision is critical when determining for whom the servant is performing services, and held that the fact that Shenker might have been given some directions by the P&LE baggageman "is at most an example of the minimum cooperation necessary to carry out a coordinated undertaking, and, as noted in *Anderson*, cannot amount to control or supervision." *Id.* at 6, 83 S.Ct. at 1671, 10 L.Ed. 2d at 714. Shenker was clearly an employee of the B&O, "even under the common law loaned-servant doctrine," and the Court thus refused to allow recovery against the P&LE under the FELA. *Ibid. See also Gulf, M. & N. R.R. v. Graham,* 153 Miss. 72, 117 So. 881 (1928) (not involving FELA); 11 Am. Jur. Trials *FELA Litigation* § 7 (1966); 32 Am.Jur. 2d *Federal Liability and Compensation Acts* § 16 (1967); Annot., 1 A.L.R. 2d 302 (1948).

*Robertson v. Yazoo & Mississippi Valley Railroad Company,* 159 F.2d 31 (5th Cir. 1947), originated from the southern district of Mississippi. The Court of Appeals affirmed a directed verdict for defendant. Plaintiff was a brakeman for the St. Louis-Southwestern Railway Company, known as the Cotton Belt, which had a contract with the defendant railroad allowing the Cotton Belt to use the tracks and facilities of defendant's yard for a stated charge per car. Plaintiff was passing through defendant's yard to pick up and take out a train of his general employer, the Cotton Belt, when he was injured by the negligent operation of one of defendant's locomotives. The Court reviewed the *Hull* and *Linstead* cases and in

an able opinion by Judge Hutcherson held that plaintiff was not doing the work of defendant at the time of his injury, and that under the limitations of the loaned servant doctrine in *Standard Oil Company v. Anderson,* plaintiff was not the special employee of the defendant.

*Lavender v. Kurn,* 327 U.S. 645, 66 S.Ct. 740, 90 L. Ed. 916 (1946), is a case of dual employment. Haney was a switch tender, employed by the Illinois Central Railroad in the yards of Grand Central Station in St. Louis. His duties included the throwing of switches for the IC, the Frisco, and other railroads using that station. Frisco paid the IC two-twelfths of Haney's wages for his services. He was killed near the tracks by a blow on the back of his head, caused apparently by a mail hook hanging loosely on the outside of a Frisco train. The Court held that there was sufficient evidence of negligence by both Frisco and IC to make a jury issue and that both railroads were Haney's employers.

Of course, no comparable situation exists in the instant case, where the evidence is wholly insufficient to make out a case of dual employment. In further contrast is *Byrne v. Pennsylvania Railroad Company,* 262 F.2d 906 (3rd Cir. 1958), in which it was held to be a jury issue as to whether an electrical engineer, whose general employer was Westinghouse Corporation, was also an employee of the defendant railroad. Westinghouse manufactured and sold the railroad four locomotives. For the fourteen months

before his death, the engineer had been engaged, on a twenty-four hour call basis, in servicing these locomotives after their delivery to the railroad. He had been working exclusively on the railroad's equipment, supervising and often participating in the repair work himself. He would be notified by a railroad representative of the need for repairs, and the railroad had the right to tell him what to do in respect to the locomotives. Under these circumstances, the Court held that it was a jury issue as to whether the engineer was in dual employment. Nothing similar exists in the present case.

## III.

We have examined carefully the cases cited by appellee in support of her position. All of the cases conclude that the particular circumstances of each case must determine the resolution of the issue. They all pertain to the loaned servant or dual employment doctrines. In both aspects, there is insufficient evidence to make even a jury issue in the instant case. *Shenker* states that "under the common law loaned servant doctrine immediate control and supervision is critical in determining for whom the servants are performing services." 374 U.S. at 6, 83 S.Ct. at 1667, 10 L.Ed. 2d at 714. The evidence here does not indicate any immediate control and supervision by Frisco over the delivery of the string of cars by Union, except for that which necessarily results from the minimum cooperation necessary to carry out a coordinated undertaking, which, as stated in

*Hull* and *Shenker*, is not enough to transfer Porter from his general employment with Union to a special employment with Frisco.

Moreover, the evidence fails to show any dual or common employment by both railroads, in contrast to the situation in *Lavender*. Essentially Union, with its own crews, provided switching services for private industries and railroads around the City of Memphis. It was in the nature of an independent contractor in performing these activities. *See* Annot., 30 A.L.R.2d 517 (1953).

REVERSED AND JUDGMENT RENDERED HERE FOR APPELLANT.

RODGERS, JONES, BRADY AND PATTERSON, JJ., CONCUR.

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

MRS. RUBY L. PORTER, ADMINISTRATRIX OF THE ESTATE OF JAMES A. PORTER, DECEASED,

Petitioner,

v.

ST. LOUIS–SAN FRANCISCO RAILWAY COMPANY,

Respondent.

No. 593

## BRIEF
## IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

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# INDEX.


Page

Brief In Opposition To Petition For Writ Of Certiorari..... 1

Statement Of The Case..... 3

Reply To Argument..... 3

Conclusion..... 5


## Table Of Authorities.


Byrne v. Penn. R. R. Co., 262 F. 2d 906..... 5

Hull v. Philadelphia & Reading Ry. Co., 252 U. S. 475, 64 L. Ed. 670..... 2, 4

Lavender v. Kurn, 327 U. S. 645 66 S. Ct. 740, 90 L. Ed. 916..... 5

Linstead v. Ches. & Ohio RR. Co., 276 U. S. 28, 48 S. Ct. 241, 72 L. Ed. 453..... 4

Porter v. St. Louis-San Francisco Railway Company, 354 Fed. 2d, 840..... 4

Quirk v. New York C & St. L. R. Co., 189 Fed 2d 97..... 2

Robinson v. B. & O. Railroad Company, 374 U. S. 1, 59 L. Ed. 849..... 2

Shenker v. B. & O. R. R. Co., 83 S. Ct. 1667, 347 U. S. 1, 10 L Ed. 700..... 4

Sinkler v. Missouri Pacific Railroad Co., 356 U. S. 318..... 4

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No. 593

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

The questions presented by petitioner have already been previously decided by this court adversely to petitioner's contentions. The Supreme Court of Mississippi based its decision on the Federal Employers Liability Act and nowhere questioned its validity but accorded full authority to it.

The decision of the Supreme Court of Mississippi was in complete accord with the prior decisions of this court. Petitioner shows no conflict with them.

The only complaint of petitioner is that the Supreme Court of Mississippi held that as a matter of law, petitioner's deceased Porter was not an employee of the Frisco, and, therefore, it was not liable to him under the Federal Employers Liability Act. This court has uniformly held that the relation of employer and employee must exist for

the Federal Employers Liability Act to apply and the relationship was to be understood in the ordinary conventional way.

*Robinson* v. *B. & O. Railroad Company*, 374 *U.S.* 1, 59 *L. Ed.* 849

*Hull* v. *P & R RR Company*, 252 *U.S.* 475, 64 *L. Ed.* 670

In both of the above cited cases the court held, as a matter of law, that the plaintiff was not an employee of the railroad at the time of the accident and there were directed verdicts for the railroad companies. This has been the uniform holding of Federal Courts:

> "Where there was no dispute as to any material fact in action under the Federal Employer's Liability Act, whether employee at time of accident was then engaged in his employment with defendant railroad was a question of law. Federal Employer's Liability Act, Sec. 1, et seq., 45 USCA, Sec. 51, et seq."

*Quirk* v. *New York C & St. L. R. Co.*, 189 *Fed. 2d* 97

Replying seriatim to petitioner's questions presented for review, we say:

The validity of the Federal Employer's Liability Act was not questioned but was sustained by the Supreme Court of Mississippi. There was no narrow or niggardly construction of the act to thwart the uniform application to railroad workers but the act was construed by the Supreme Court of Mississippi in accord and agreement with the prior rulings of this court.

The Supreme Court of Mississippi decided that the deceased was not an employee as a matter of law and this decision of the Supreme Court of Mississippi was based on the evidence offered by the plaintiff and not on any evidence of the defendant. When the decision of the Supreme Court of Mississippi is in accord with the prior decisions of this court, it cannot be said that it affords grounds for certiorari.

## Statement Of The Case.

The Supreme Court of Mississippi stated the case fairly and clearly in its opinion. Petitioner's statement is erroneous in these respects:

There was no evidence that the yard clerk at the entrance of the Frisco yards was an agent of the Frisco and had authority to speak for it. (Page 6, Petitioner's Brief.) The evidence was not that the yard clerk told petitioner's foreman that there was one car *at* the far end. On the contrary, the evidence was that this yard clerk, in response to inquiry from the foreman as to whether or not the track was clear, stated that the track was clear except for one car *on* the far end.

There were no eye witnesses to the accident. The evidence was that the Frisco car was coupled with the other cars but there was no evidence that it collided with the other cars with "great force and violence" and no evidence that Porter was knocked from the top of the car. This can be deduced only by imposing inference upon inference. While there was evidence that Porter's body was severed by the train, there was no evidence that his body was in this position as a result of a fall caused by a collision and violence or in what manner it got between the rails. It could have been in that position as a result of Porter's slipping or undertaking to go between the cars and losing his hold, or other causes.

## Reply To Argument.

Nowhere in the brief does petitioner allege that Porter was actually employed by the Frisco, but he attempts to reach employment by claiming that although he was paid by the Union Railroad Company in making delivery to the Frisco, it was for the use and benefit of the Frisco and the Frisco had the right to designate the place where delivery was to be received and Porter was subject to the general

operative rules and regulations while making the delivery. This was fully discussed by the Supreme Court of Mississippi which noted that no orders were given by Frisco and no directions as to where the delivery was to be received. Receiving delivery does not constitute the person making delivery the employee of the receiver. It is incident to all receipts of delivery that the receiving party has the right to designate the point at which the delivery is to be made and to expect the party making delivery to do so in an orderly and proper manner without becoming responsible for his acts in so doing.

Replying to the cases cited by petitioner:

*Sinkler* v. *Missouri Pacific Railroad Co.*, 356 U.S. 318, was not a case between employer and employee, but related to liability by the railroad for the act of an agent which is specifically provided in the statute.

In the case of *Porter* v. *St. Louis–San Francisco Railway Company*, 354 Fed. 2d, 840, which was this case on appeal before the Court of Appeals For The Fifth District, the court made no finding as to liability or whether or not the relationship of master and servant existed but held that the removal of the case to the Federal Court on the pleadings was improper and reversed the case on the matter of removal and not on a question of liability or existence of the relationship of master and servant.

The Supreme Court of Mississippi considered all of the cases cited by petitioner and in its opinion discussed the cases of

*Hull* v. *Philadelphia & Reading Ry. Co.*, 252 *U. S.* 475, 64 *L. Ed.* 670

*Linstead* v. *Ches. & Ohio RR Co.*, 276 *U. S.* 28, 48 *S. Ct.* 241, 72 *L. Ed.* 453

*Shenker* v. *B. & O. R. R. Co.*, 83 *S. Ct.*, 1667, 347 *U. S.* 1, 10 *L. Ed.* 700

*Lavender* v. *Kurn*, 327 *U.S.* 645, 66 *S. Ct.* 740, 90 *L. Ed.* 916

*Byrne* v. *Penn. R. R. Co.*, 262 *F.* 2*d* 906,

as being in harmony with it.

## Conclusion.

The granting of certiorari and review of this case by this court would add nothing to the applicable law. It would involve no question peculiar to Federal Law. Any decision on the law different from that of the Supreme Court of Mississippi would be in conflict with the former and established decisions of this court. It is not enough to call the decision of the Supreme Court of Mississippi narrow and niggardly without showing any ground to sustain such claim.

Wherefore, respondent submits that petitioner is not entitled to have this case reviewed again and that the petition for writ of certiorari to the Supreme Court of Mississippi should be denied.

Respectfully submitted,
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## Certificate Of Proof Of Service.

I, C. R. Bolton, Attorney for the respondent herein, and a member of the bar of the Supreme Court of the United States, hereby certify that I received copy of the petition for writ of certiorari on September 24, 1968, and I am this day serving copies of the above and foregoing Brief In Opposition To Petition For Writ Of Certiorari To The Supreme Court Of The State Of Mississippi by mailing same in properly addressed envelopes with first class postage prepaid to Honorable Frank E. Everett, Jr., Counsel for Petitioner, First National Bank Building, Vicksburg, Mississippi; Honorable William W. Ramsey, Attorney, First National Bank Building, Vicksburg, Mississippi; and Honorable John B. Farese, Attorney, Ashland, Mississippi.

This the 17 day of October, 1968.

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